No. 14-556

Supreme Court of the United States

SUPREME COURT, U.S.
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JAMES OBERGEFELL, *et al.*,

Petitioners,

—v.—

RICHARD HODGES, Director,
Ohio Department of Health, *et al.*,

Respondents.

BRITTANI HENRY, *et al.*,

Petitioners,

—v.—

RICHARD HODGES, Director,
Ohio Department of Health, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

PARTIES TO THE PROCEEDING

Petitioners in the proceeding below in *Obergefell v. Hodges* were James Obergefell, David Brian Michener, and Robert Grunn.

Petitioners in the proceeding below in *Henry v. Hodges* were Brittani Henry and Brittni ("LB") Rogers, Georgia Nicole Yorksmith and Pamela Yorksmith, Kelly Noe and Kelly McCracken, and Joseph J. Vitale and Robert Talmas and their son, Adopted Child Doe.

Respondent in both *Obergefell* and *Henry* is Richard Hodges, who replaced formerly named defendant Lance D. Himes as Director of the Ohio Department of Health. He is sued in his official capacity only.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 3

STATEMENT OF THE CASE 4

A. Ohio's Marriage Recognition Bans 4

B. Petitioners 6

1. *Obergefell* Petitioners 6

2. *Henry* Petitioners 8

C. District Court Proceedings 12

1. *Obergefell* 12

2. *Henry* 14

D. Sixth Circuit Decision 15

SUMMARY OF ARGUMENT 18

ARGUMENT 20

I. The Recognition Bans Are Unconstitutional Under *Windsor* 20

A. The Recognition Bans' "Design, Purpose, And Effect" Are To Impose Inequality 21

B. *Windsor*'s Principles Apply To State As Well As Federal Marriage Recognition Bans 30

II. Ohio's Refusal To Recognize Existing Marriages Of Same-Sex Couples Is Subject To Heightened Scrutiny Under The Due Process Clause 32

III. Ohio's Recognition Bans Trigger Heightened Equal Protection Scrutiny Because They Discriminate Based on Sexual Orientation and Sex 38

A. No Presumption Of Constitutionality Should Apply To Sexual Orientation Discrimination 38

B. Explicitly Rejecting A Presumption Of Constitutionality For Sexual Orientation Discrimination Is Consistent With The Court's Established Jurisprudence For Identifying "Suspect" And "Quasi-suspect" Classifications 41

C. Ohio's Recognition Bans Also Discriminate Based On Sex And Warrant Heightened Scrutiny On That Basis 48

IV. Ohio's Recognition Bans Fail Any Standard Of Review 49

A. The Recognition Bans Cannot Be Upheld Based On The Discriminatory Status Quo 50

1. *"Leave It To The State Democratic Process" Rationale* 51

2. *"Wait And See" Rationale* 52

3. *"Upholding The Traditional Definition Of Marriage" Rationale* ... 54

B. Preventing "Irresponsible Procreation" Does Not Explain The Recognition Bans 55

C. Promoting "Optimal Parenting" Cannot Justify The Recognition Bans ... 58

CONCLUSION 60

TABLE OF AUTHORITIES

Page

CASES

Allstate Ins. Co. v. Hague,
449 U.S. 302 (1981) 32

Baehr v. Lewin,
852 P.2d 44 (Haw. 1993) 48

Baker v. Nelson,
409 U.S. 810 (1972) 15

Baker v. State,
744 A.2d 864 (Vt. 1999) 48

Baskin v. Bogan,
766 F.3d 648 (7th Cir. 2014) ..... *passim*

Bd. of Trs. of Univ. of Ala. v. Garrett,
531 U.S. 356 (2001) 24

Beller v. Middendorf,
632 F.2d 788 (9th Cir. 1980) 40

Bostic v. Schaefer,
760 F.3d 352 (4th Cir. 2014) ..... *passim*

Boutilier v. INS,
387 U.S. 118 (1967) 42

Bowen v. Gilliard,
483 U.S. 587 (1987) 41, 45

Bowers v. Hardwick,
478 U.S. 186 (1986) 40

Brenner v. Scott,
999 F. Supp. 2d 1278 (N.D. Fla. 2014),
appeals docketed, Nos. 14-14061-AA, 14-14066-AA (11th Cir.) 35

Califano v. Goldfarb,
430 U.S. 199 (1977) 44

Christian Legal Soc'y v. Martinez,
561 U.S. 661 (2010) 46

City of Cleburne v. Cleburne Living Ctr.,
473 U.S. 432 (1985) ..... *passim*

Cleveland Bd. of Educ. v. LaFleur,
414 U.S. 632 (1974) 34

Dennis v. R.R. Ret. Bd.,
585 F.2d 151 (6th Cir. 1978) 30

Eisenstadt v. Baird,
405 U.S. 438 (1972) 50, 57

FCC v. Beach Commc'ns,
508 U.S. 307 (1993) 38

Frontiero v. Richardson,
411 U.S. 677 (1973) 17, 44, 46, 47

Golinski v. U.S. Office of Pers. Mgmt.,
824 F. Supp. 2d 968 (N.D. Cal. 2012) 42

Goodridge v. Dep't of Pub. Health,
798 N.E.2d 941 (Mass. 2003) 5, 22, 48

Griego v. Oliver,
316 P.3d 865 (N.M. 2013).....42

Griswold v. Connecticut,
381 U.S. 479 (1965) 33, 35, 37, 56

Hall v. Florida,
134 S. Ct. 1986 (2014) 31

Heller v. Doe,
509 U.S. 312 (1993) 49, 54

Hodgson v. Minnesota,
497 U.S. 417 (1990) 34

Hollingsworth v. Perry,
133 S. Ct. 2652 (2013) 47

Hooper v. Bernalillo Cnty. Assessor,
472 U.S. 612 (1985) 50

In re Marriage Cases,
183 P.3d 384 (Cal. 2008) 42

In re Miller's Estate,
214 N.W. 428 (Mich. 1927) 30

J.E.B. v. Alabama ex rel. T.B.,
511 U.S. 127 (1994) 39, 44, 48

Jimenez v. Weinberger,
417 U.S. 628 (1974) 42

Johnson v. California,
543 U.S. 499 (2005) 44

Keith v. Pack,
187 S.W.2d 618 (Tenn. 1945) 30

Kerrigan v. Comm'r of Pub. Health,
957 A.2d 407 (Conn. 2008) 42

Kitchen v. Herbert,
755 F.3d 1193 (10th Cir. 2014) 17, 31, 35, 58

Kitchen v. Herbert,
961 F. Supp. 2d 1181 (D. Utah 2013),
aff'd, 755 F.3d 1193 (10th Cir. 2014) 48, 53

Latta v. Otter,
771 F.3d 456 (9th Cir. 2014) ..... *passim*

Lawrence v. Texas,
539 U.S. 558 (2003) ..... *passim*

Loving v. Virginia,
388 U.S. 1 (1967) 17, 34, 60

Madewell v. United States,
84 F. Supp. 329 (E.D. Tenn. 1949) 28

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 52

Mass. Bd. of Ret. v. Murgia,
427 U.S. 307 (1976) 45

Mathews v. Lucas,
427 U.S. 495 (1976) 27

Mazzolini v. Mazzolini,
155 N.E.2d 206 (Ohio 1958) 30

Michael H. v. Gerald D.,
491 U.S. 110 (1989) 37

M.L.B. v. S.L.J.,
519 U.S. 102 (1996) 36

Nyquist v. Mauclet,
432 U.S. 1 (1977) 45

Pedersen v. Office of Pers. Mgmt.,
881 F. Supp. 2d 294 (D. Conn. 2012) 42

Peefer v. State,
182 N.E. 117 (Ohio Ct. App., Greene
Cnty. 1931) 30

Perry v. Schwarzenegger,
704 F. Supp. 2d 921 (N.D. Cal. 2010) 48

Pers. Adm'r of Mass. v. Feeney,
442 U.S. 256 (1979) 23

Planned Parenthood of Southeastern Pa. v. Casey,
505 U.S. 833 (1992) 24

Plessy v. Ferguson,
163 U.S. 537 (1896) 55

Plyler v. Doe,
457 U.S. 202 (1982) 45, 57

Reed v. Reed,
404 U.S. 71 (1971) 42

Rich v. Sec'y of Army,
735 F.2d 1220 (10th Cir. 1984) 40

Roberts v. U.S. Jaycees,
468 U.S. 609 (1984) 36

Romer v. Evans,
517 U.S. 620 (1996) ..... *passim*

Rowland v. Mad River Local Sch. Dist.,
470 U.S. 1009 (1985) 40, 42

Shapiro v. Thompson,
394 U.S. 618 (1969) 37

SmithKline Beecham Corp. v. Abbott Labs.,
740 F.3d 471 (9th Cir. 2014) 39, 41

State v. Brown,
849 N.E.2d 44 (Ohio Ct. App., Stark Cnty. 2006).....22, 23

Stevenson v. Gray,
56 Ky. 193 (Ct. App. 1856) 30

Strauder v. West Virginia,
100 U.S. 303 (1880) 40

Turner v. Safley,
482 U.S. 78 (1987) 35, 37, 56

United States v. Carolene Prods. Co.,
304 U.S. 144 (1938) 40

United States v. Virginia,
518 U.S. 515 (1996) 48

United States v. Windsor,
133 S. Ct. 2675 (2013) ..... *passim*

U.S. Dep't of Agric. v. Moreno,
413 U.S. 528 (1973) 49, 53

Varnum v. Brien,
763 N.W.2d 862 (Iowa 2009) 42

W. Va. State Bd. of Educ. v. Barnette,
319 U.S. 624 (1943) 52

Washington v. Glucksberg,
521 U.S. 702 (1997) 36

Weber v. Aetna Cas. & Sur. Co.,
406 U.S. 164 (1972) 57

Whitewood v. Wolf,
992 F. Supp. 2d 410 (M.D. Pa. 2014) 35, 41

Williams v. Illinois,
399 U.S. 235 (1970) 54

Williams v. North Carolina,
317 U.S. 287 (1942) 36

Windsor v. United States,
699 F.3d 169 (2d Cir. 2012)
aff'd, 133 S. Ct. 2675 (2013) 39, 41, 44, 45, 46

Wolf v. Walker,
986 F. Supp. 2d 982 (W.D. Wis. 2014),
aff'd sub nom. Baskin v. Bogan, 766 F. 3d 648
(7th Cir. 2014).....41, 46

Wolfle v. United States,
291 U.S. 7 (1934) 37

Youngberg v. Romeo,
457 U.S. 307 (1982) 36

Zablocki v. Redhail,
434 U.S. 374 (1978) 33

CONSTITUTIONS & STATUTES

U.S. Const. amend. XIV, § 1 1

1 U.S.C. § 7 6

28 U.S.C. § 1254(1) 1

38 U.S.C. § 103(c) 26

42 U.S.C. § 416(h)(1) 25

Ohio Const. art. XV, § 11 .....1, 4, 5

Ohio Rev. Code Ann. § 3101.01(C) 2, 4, 5, 30

Ohio Rev. Code Ann. § 3107.18(A) 9

Ohio Rev. Code Ann. § 3111.03 8

Ohio Rev. Code Ann. § 3111.95 8

Ohio Rev. Code Ann. § 3111.95(A) 25

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OPINIONS BELOW

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JURISDICTION

The judgment of the Court of Appeals was entered on November 6, 2014. Petitioners filed their timely petition for a writ of certiorari in this Court on November 14, 2014. The petition for writ of certiorari was granted on January 16, 2015. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. XIV, § 1

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OHIO CONST. art. XV, § 11

Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.

OHIO REV. CODE ANN. § 3101.01(C)

(1) Any marriage between persons of the same sex is against the strong public policy of this state. Any marriage between persons of the same sex shall have no legal force or effect in this state and, if attempted to be entered into in this state, is void ab initio and shall not be recognized by this state.

(2) Any marriage entered into by persons of the same sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state.

(3) The recognition or extension by the state of the specific statutory benefits of a legal marriage to nonmarital relationships between persons of the same sex or different sexes is against the strong public policy of this state. Any public act, record, or judicial proceeding of this state, as defined in section 9.82 of the Revised Code, that extends the specific statutory benefits of legal marriage to nonmarital relationships between persons of the same sex or different sexes is void ab initio. Nothing in division (C)(3) of this section shall be construed to do either of the following:

(a) Prohibit the extension of specific benefits otherwise enjoyed by all persons, married or unmarried, to nonmarital relationships between persons of the same sex or different sexes, including the extension of benefits conferred by any statute that is not expressly limited to married persons, which includes but is not limited to benefits available under Chapter 4117 of the Revised Code.

(b) Affect the validity of private agreements that are otherwise valid under the laws of this state.

(4) Any public act, record, or judicial proceeding of any other state, country, or other jurisdiction outside this state that extends the specific benefits of legal marriage to nonmarital relationships between persons of the same sex or different sexes shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state.

INTRODUCTION

Petitioners married seeking a cherished status that protects families throughout life, from cradle to grave. But Ohio refuses to respect the dignity and status conferred on Petitioners' marriages by other states. From the start of the marriage to the birth of children to the death of one spouse and beyond, Ohio erases the legal relationships of Petitioners' families. Ohio treats these spouses as legal strangers to one another and recognizes only one member of each couple as the legal parent to their children. Ohio even cruelly refuses to recognize Petitioners' marriages on death certificates when one spouse dies. Through its marriage recognition bans, Ohio strikes out at a class of individuals whose intimate, personal relationships have been afforded a solemn and special status by other states—men and women who love and marry a person of the same sex.

Ohio and the court below contend that legal recognition of the marriages of same-sex couples must await the day when the political majority of each state is ready to bestow equal rights on these families. They assert that the federal courts should stand aside while same-sex spouses and their

children suffer daily hardships and indignities imposed by the unconstitutional refusal of states like Ohio to recognize these couples' marriages. Wait, they say, until the majority decides the time is right.

The Petitioners, their children, and many like them have waited too long already. Ohio widowers James Obergefell and David Michener ran out of time when death took their spouses. The infants born to the Henry-Rogers, Yorksmith, and Noe-McCracken families could not wait to arrive in this world until a majority voted that their parents' marriages would be honored. And Adopted Baby Doe could not wait for a home until a majority of Ohioans chose to recognize the marriage of his New York adoptive fathers. No more children should be demeaned by states like Ohio; no more loving spouses should die without the dignity that accompanies respect for their marriages, while the democratic process grinds its slow way towards justice. Following in the path of *United States v. Windsor*, which held that guarantees of liberty and equality prohibit the federal government from demeaning the dignity and integrity of the families of married same-sex spouses, 133 S. Ct. 2675, 2695-96 (2013), this Court should declare the Ohio bans on marriage recognition unconstitutional.

STATEMENT OF THE CASE

A. Ohio's Marriage Recognition Bans

Prior to 2004, Ohio followed the firm practice of recognizing all marriages entered out of state, even if the marriages would have been void if performed in Ohio. J.A. 247-248, 255. That changed in 2004, with Ohio's enactment of Ohio Rev. Code Ann. § 3101.01(C) and adoption of Ohio Const. art. XV, § 11

(collectively, the "recognition bans" or "bans"). While a separate part of the 2004 measures prohibit same-sex couples from marrying in the state, the recognition bans deny married same-sex couples any legal recognition for their marriages entered in other jurisdictions.

Ohio's recognition bans were part of a wave of similar state restrictions on marriage rights for same-sex couples. Those measures were in part reactions to a 2003 Massachusetts ruling under that state's constitution holding that same-sex couples have the right to marry. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); J.A. 99, 102. But Ohio went further than many other states by also prohibiting recognition of any legal status "that intends to approximate the design, qualities, significance or effect of marriage," Ohio Const. art. XV, § 11, such as out-of-state civil unions or comprehensive domestic partnerships. The bans force same-sex couples who seek to formalize their commitment through a government-recognized relationship to marry in another state but then endure the indignity and inequity of not being recognized as married upon returning or moving to Ohio. J.A. 124.

The recognition bans' purpose was to create "two distinct and inherently unequal Ohios." J.A. 124. A leading Senate supporter of Ohio Rev. Code Ann. § 3101.01(C) stated that the legislation would ensure that same-sex couples' relationships would not "have all the opportunities" and would not be "equal to everyone else's." Pet. App. 167a. The constitutional amendment's primary sponsor, Citizens for Community Values, relied on numerous negative and

inaccurate representations of lesbians and gay men, including warnings that same-sex relationships "expose gays, lesbians and bisexuals to extreme risks of sexually transmitted diseases, physical injuries, mental disorders and even a shortened life span" and that "[w]e won't have a future unless [heterosexual] moms and dads have children." Pet. App. 168a. In the official ballot report, amendment proponents urged voters to block giving "official status, recognition and benefits to homosexual and other *deviant* relationships that seek to imitate marriage." J.A. 170 (emphasis added). Ohio voters passed the recognition bans amidst this campaign of fear and misrepresentation.

B. Petitioners

1. *Obergefell* Petitioners

James Obergefell fell deeply in love in 1992 with his late spouse, John Arthur. For more than two decades they built a life together in Cincinnati, Ohio, where they worked and had deep roots in the community. J.A. 24, 29. Tragedy struck in 2011, when John was diagnosed with terminal amyotrophic lateral sclerosis—known as ALS, or Lou Gehrig's disease. Pet. App. 168a-169a. James "had the honor of caring" for John throughout John's illness. J.A. 37.

Following this Court's June 2013 *Windsor* ruling striking down Section 3 of the federal Defense of Marriage Act, 1 U.S.C. § 7 ("DOMA"), the couple resolved to marry before John died. Because Ohio would not permit them to marry, family and friends opened their hearts and wallets so the couple could travel to Maryland on a medically-equipped plane and marry there. J.A. 25. On July 11, 2013, with John too ill to move any further, they were wed

inside the plane as it sat on the Baltimore tarmac. J.A. 25, 70.

It was a joyous moment, but cruelly short-lived. When their plane touched back down in Ohio, the state's recognition bans effectively annulled their marriage for all state law (and some federal law) purposes. The distraught couple realized that unless they obtained a court order, John's death certificate, his "final record as a person and as a citizen of Ohio," would not "reflect and respect [their] 20-year relationship and legal marriage." J.A. 37-38. In James's words, "Not to do so is hurtful, and it is hurtful for the rest of time." J.A. 38. John died on October 22, 2013, at the age of 48. J.A. 367.

In addition to dealing with the grief of losing his husband, James continues to suffer a multitude of inequities and indignities because Ohio refuses to recognize him as John's surviving spouse. He is hindered from applying for benefits as a surviving spouse, filing joint tax returns for the period in which John was alive, ensuring that through posterity the fact of their marriage will be reflected in the official records of his and John's home state, and, some day, being buried with John in John's family's cemetery plot. J.A. 25-26, 38.

Ohioans David Michener and his late spouse, William Ives, lived as a loving couple for 18 years, raising three adopted children. On July 22, 2013, they married in Delaware. Tragically and unexpectedly, William died of natural causes on August 27, 2013, at the age of 54, leaving David to parent their children alone. Pet. App. 169a; J.A. 368. David sought a death certificate identifying him as William's surviving spouse so he could fulfill

William's wishes to be cremated and "to bring closure to the family in a manner that respected their marriage." J.A. 74.

The third *Obergefell* Petitioner, Robert Grunn, is a licensed Ohio funeral director whose statutory responsibilities involve filling out death certificates, including for Ohio decedents with spouses of the same sex. These death certificates are required for burial, cremation, insurance, probate, and other purposes after the death of a spouse. J.A. 268-269.

2. *Henry* Petitioners

Brittani Henry and LB Rogers, Nicole and Pam Yorksmith, Kelly Noe and Kelly McCracken, and Joseph Vitale and Robert Talmas are married couples who welcomed Ohio-born children into their families.

When the *Henry* case was filed, three of the four married couples had conceived using anonymous donor insemination ("ADI"), and they all anticipated births in Ohio hospitals. Pet. App. 110a, 113a-115a. Ohio's recognition bans would have denied those children the dignity and protections that come from identification of their two legal parents on their birth certificates. Before these three babies were born, the district court ruled that their birth certificates should reflect that each baby has two parents based on the recognition of parentage that automatically applies under Ohio law when a child is born to a married couple using ADI. Pet. App. 138a-139a, 151a. *See* Ohio Rev. Code Ann. § 3111.95 (spouse of woman using ADI is conclusively deemed legal parent of resulting child); *see also* Ohio Rev. Code Ann. § 3111.03. To the joy of their parents, the three babies were born later in 2014. Pursuant to the court's

order, these infants were all issued Ohio birth certificates securing their legal relationships with both of their parents. However, if the Sixth Circuit's ruling is not overturned, Ohio can take these children's birth certificates back and literally remove from each child legal acknowledgement of one parent.[1]

The fourth Petitioner couple, two married men living in New York, adopted an Ohio-born baby boy in 2013, who also is a Petitioner. Pet. App. 110a, 116a. The Vitale-Talmas couple is refused recognition of their child's adoption decree and denied an amended birth certificate identifying both as parents, which Ohio routinely would grant for adoptive couples whose marriages the state respects. *See* Ohio Rev. Code Ann. §§ 3705.12(A)(1), 3107.18(A); Pet. App. 140a; J.A. 410-411.

Ohio natives Brittani Henry and LB Rogers have been in a loving, committed relationship since 2008. Seeking to be married before becoming parents, the couple journeyed to New York while Brittani was pregnant and wed on January 17, 2014. Later in 2014 Brittani gave birth to their baby boy. Pet. App. 21a; J.A. 394. The joy of their son's birth and the couple's shared adventure as parents was accompanied by the anxiety and fear that came with non-recognition of their marriage. Not only does Ohio seek to refuse to identify LB as a legal parent

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[1] While Ohio issued each child a birth certificate listing both parents pursuant to the order of the district court, Ohio included special notations on the birth certificates stating they were issued pursuant to the district court's order. Moreover, the State has explicitly reserved the right to amend the birth certificates should Ohio prevail on appeal. *Henry* Defs.' Mot. Stay 2, ECF 31, Case No. 14-cv-129.

on their infant's birth certificate, but the couple also must suffer added anxiety about their son's security and wellbeing should either parent become incapacitated or die. J.A. 394-395. LB worries, "if something should happen to my wife such that she could no longer take care of our child, there is no guarantee that I will be granted custody," or should LB die, whether LB's own parents would be legally recognized as grandparents. J.A. 395.

Nicole and Pam Yorksmith, who live in Kentucky near the Ohio border, have been a committed couple since 2006 and married in California in 2008. J.A. 397-398. In 2009, the married couple legally changed their names to combine their surnames "York" and "Smith" so that, when they had children in the future, their family would share the same last name. Their first son, G. Yorksmith, conceived by Nicole with ADI, was born in a Cincinnati hospital in 2010. J.A. 398. Because Ohio does not recognize their marriage or Pam as a parent, Pam's name does not appear on her son's birth certificate. They have experienced both practical and legal disadvantages as a result. For example, when their son needed a passport, only Nicole was permitted to apply. They had to secure a medical power of attorney so Pam could obtain information from their son's healthcare providers. They had to execute a general power of attorney to authorize Pam to speak with their son's teachers and daycare workers. At any moment, Nicole and Pam fear, "these documents could be rejected and [their] son's safety jeopardized if Pam is not acknowledged as an equal parent." J.A. 398. In 2014 Nicole gave birth in Ohio to their second son, again without the security of a birth certificate

naming Pam, who equally co-parents their boys. Pet. App. 21a.

Kelly Noe and Kelly McCracken, who also live near Ohio in Kentucky, have been a committed, loving couple since 2009. They married in Massachusetts in 2011. Kelly Noe gave birth to their child in 2014 in a Cincinnati hospital. Pet. App. 21a; J.A. 402. Like the Yorksmiths, this couple seeks to have both parents' names on their child's birth certificate because Kelly McCracken "will be this child's parent in every sense." J.A. 402. Ohio's refusal to recognize their marriage and their child's parentage "denigrates" their family and "demeans and harms all of" them. J.A. 402.

Joseph Vitale and Robert Talmas have been in a loving, committed relationship since 1997. J.A. 404. In 2011 they married in New York, where they live and built careers. They were able to see their dream of being parents together come true when they adopted a son born in Ohio in 2013. The day he was born, Joseph and Robert were at the hospital to welcome their baby boy to the world, sleeping in the same hospital room with him until he was discharged. A New York court issued the final adoption decree on January 17, 2014. J.A. 405. Together Joseph and Robert have given their little boy a home filled with love and support. J.A. 406. But Ohio insists that only one of his parents can be listed on his amended birth certificate. Joseph wants to know "[h]ow would we choose which parent should be listed on the birth certificate?" and "[w]hat message does that give our son?" J.A. 406. From hundreds of miles away, Ohio disparages Adopted Child Doe's family, making it harder for his parents

to take care of his medical needs, obtain a passport for him, or register him in school. J.A. 406. Throughout his life, Ohio's recognition bans will undermine this child's ability to feel secure in his family's integrity and equality, even in a state like New York that fully respects his parents' marriage and his adoption decree.

C. District Court Proceedings

1. *Obergefell*

With John Arthur's death approaching, he and James Obergefell filed a complaint against, among others, the Director of the Ohio Department of Health ("Director") and the Registrar of the Cincinnati Health Department[2] on July 19, 2013, just weeks after this Court's *Windsor* decision. Compl., ECF 1, Case No. 13-cv-501. The complaint alleged that the recognition bans, as applied, violate constitutional guarantees of due process and equal protection.

The district court granted James and John a temporary restraining order ("TRO") requiring Ohio to recognize their marriage on John's death certificate when the time came. J.A. 41. Pursuant to that TRO, upon John's death in October, Ohio issued a death certificate accurately naming James as his surviving spouse. Pet. App. 169a. On September 3, 2013, David Michener joined the case and was granted a similar TRO requiring Ohio to recognize

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[2] The Registrar, who was also a defendant in *Henry*, did not appeal the district court rulings in either case.

his marriage and status as surviving spouse on William's death certificate. Pet. App. 169a-170a; J.A. 56.

On October 29, 2013, the *Obergefell* Petitioners moved for a declaratory judgment on their as-applied claims, seeking permanently to enjoin the Director and his officers from applying the recognition bans against them in issuing death certificates.[3] J.A. 8. The record included live testimony from the TRO hearing, uncontested expert declarations, and declarations from the Petitioners explaining the impact of the recognition bans on their lives. J.A. 23-40, 88-368. The district court granted the motion on December 23, 2013, ruling "that under the Constitution of the United States, Ohio must recognize valid out-of-state marriages between same-sex couples on Ohio death certificates." Pet. App. 162a.

The district court held that "[t]he right to remain married ... is a fundamental liberty interest appropriately protected by the Due Process Clause of the United States Constitution. ... Ohio's marriage recognition bans violate this fundamental right without rational justification." Pet. App. 174a. The court also held that the recognition bans discriminate on the basis of sexual orientation and fail under both heightened equal protection scrutiny, Pet. App. 203a, and rational basis review under the Equal Protection Clause. Pet. App. 204a.

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[3] Ohio has complied with the district court's order by issuing accurate death certificates for John Arthur and William Ives but has also asserted a right to amend those death certificates in the future to remove references to their marriages and surviving spouses. *See* J.A. 370-371.

2. *Henry*

On February 10, 2014, the *Henry* Petitioners filed a complaint against the Director asserting that Ohio's refusal to respect their marriages violates federal constitutional guarantees of due process, equal protection, and the right to travel. J.A. 372. *Henry* went "beyond the as-applied challenge pursued in *Obergefell*," alleging more broadly that no set of circumstances exist under which the recognition bans can be validly applied. Pet. App. 118a. The suit also asserted that Ohio's refusal to recognize the Vitale-Talmas adoption decree violates the Full Faith and Credit Clause of the federal Constitution. J.A. 389. The district court issued a declaratory judgment and permanent injunction in Petitioners' favor on April 14, 2014. Pet. App. 150a.

As in *Obergefell*, the district court held that "Ohio's refusal to recognize same-sex marriages performed in other jurisdictions violates the substantive due process rights of the parties to those marriages" by depriving them "of their rights to marry, to remain married, and to effectively parent their children, absent a sufficient articulated state interest for doing so." Pet. App. 137a. The district court also reaffirmed that Ohio's recognition bans discriminate on the basis of sexual orientation and therefore warrant heightened equal protection scrutiny, Pet. App. 142a-143a, although they also fail rational basis review. Pet. App. 144a.

Because the record—including the judicially noticed record of *Obergefell*—was "staggeringly devoid of any legitimate justification for the State's ongoing arbitrary discrimination on the basis of sexual orientation," the district court declared the

recognition bans "facially unconstitutional and unenforceable under any circumstances." Pet. App. 108a. Recognizing the severe irreparable harm suffered by Petitioners—and particularly their children—the court permanently enjoined the Director and his officers and agents from enforcing the bans. Pet. App. 150a-151a.

The court also granted the Vitale-Talmas family's claim for enforcement of the New York adoption decree, enjoining the Director from denying full faith and credit to decrees of adoption duly obtained by same-sex couples in other jurisdictions. Pet. App. 148a, 153a-157a n.i.

The court subsequently stayed its mandate pending appeal except as to the Petitioners' children's birth certificates. Pet. App. 152a n.25.

D. Sixth Circuit Decision

The Sixth Circuit consolidated the appeals in *Obergefell* and *Henry*. Order, ECF 6, Case No. 14-3464. The cases were argued with four related appeals from district court decisions striking down marriage or recognition bans in Kentucky, Michigan, and Tennessee.

On November 6, 2014, a divided panel of the Sixth Circuit reversed the lower courts in all six cases. Pet. App. 1a, 69a.

The court decided as a threshold matter that it was bound to reject Petitioners' claims based on this Court's four-decade-old one-line summary dismissal of a challenge to Minnesota's refusal to issue a marriage license to a same-sex couple in *Baker v. Nelson*, 409 U.S. 810 (1972). Pet. App. 24a.

Rather than end its opinion there, however, the majority proceeded to address additional arguments raised in the cases. It framed the ultimate issue before the court as "[w]ho decides?" Pet. App. 16a. Opining that it is "[b]etter" to leave social change to "the customary political processes," the majority concluded that the courts should not "resolve new social issues like this one." Pet. App. 69a.

The court did not find any basis for applying heightened judicial scrutiny, holding that there is no "right to gay marriage." Pet. App. 47a. Relying on circuit precedent holding that a presumption of constitutionality applies to sexual orientation classifications, the court rejected the argument that the bans trigger heightened equal protection scrutiny. Pet. App. 52a.

Applying rational basis review, the court determined that the bans rationally further two purported justifications: (1) the government's interest in regulating male-female relationships because of their procreative capacity and "risk of unintended offspring," Pet. App. 35a-36a, and (2) the government's desire to "wait and see" and rely on the democratic process to change a long-accepted norm. Pet. App. 36a-37a. The court further held that the bans were not motivated by animus towards lesbians and gay men. Pet. App. 42a.

The majority also held that the states' refusal to recognize out-of-state marriages does not violate the constitutional guarantees of due process or equal protection largely for the same reasons it concluded the states could constitutionally withhold the right to marry within their borders. Pet. App. 63a-67a.

Although the majority did not specifically address the Vitale-Talmas Petitioners' Full Faith and Credit claim, its blanket reversal of all decisions below reversed the district court's ruling on that claim as well.[4]

The dissent cited with approval the recent opinions of the Fourth, Seventh, Ninth, and Tenth Circuits on the same questions, all striking down denial of marriage rights to same-sex couples. Pet. App. 86a-87a; *see Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014).

The dissent rejected the "irresponsible procreation" rationale, noting that, while the majority characterizes marriage as "an institution conceived for the purpose of providing a stable family unit 'within which children may flourish,' they ignore the destabilizing effect of its absence in the homes of tens of thousands of same-sex parents throughout the four states of the Sixth Circuit." Pet. App. 72a.

With respect to the "wait and see" rationale, the dissent emphasized the courts' responsibility to resolve cases involving individual rights, noting that this same argument was raised and rejected in *Loving v. Virginia*, 388 U.S. 1 (1967), and *Frontiero v. Richardson*, 411 U.S. 677 (1973). Pet. App. 103a.

Accordingly, the dissent concluded that "[i]f we in the judiciary do not have the authority, and indeed

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[4] This Court did not accept for review the question whether Ohio's denial of recognition to the adoption decree in and of itself violates the guarantee of Full Faith and Credit.

the responsibility, to right fundamental wrongs left excused by a majority of the electorate, our whole intricate, constitutional system of checks and balances, as well as the oaths to which we swore, prove to be nothing but shams." Pet. App. 106a.

SUMMARY OF ARGUMENT

1. Ohio's recognition bans violate the Fourteenth Amendment for all the reasons this Court struck down DOMA as unconstitutional in *Windsor*. That case invalidated DOMA because DOMA (a) was designed to treat unequally those same-sex spouses whom states, by their "marriage laws, sought to protect in personhood and dignity," 133 S. Ct. at 2696; (b) reflected a purpose to refuse recognition to existing marriages in order to make same-sex couples unequal to other married couples; (c) had the practical effect of imposing a stigma on married same-sex couples and their families by "instruct[ing] ... all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others," *ibid.*; and (d) departed from a strong tradition of respecting marriages conferred by the states.

The parallels between DOMA and Ohio's recognition bans are striking. Like DOMA, the recognition bans impose a "discrimination[] of an unusual character," by singling out for disfavored treatment same-sex couples married by other states in order to mark those marriages as unequal. *Id.* at 2692 (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)). The recognition bans brand the marriages and families of same-sex couples for second-class treatment. And they depart from longstanding traditions of federalism in order to impose real costs

on these families. As in *Windsor*, no legitimate interest can "overcome[] the purpose and effect to disparage and to injure those whom [a sovereign] State, by its marriage laws, sought to protect in personhood and dignity." *Id.* at 2696. The Constitution withholds from both state and federal government "the power to degrade or demean" in this manner." *Id.* at 2695. The recognition bans are therefore unconstitutional.

2. The recognition bans must also be subjected to heightened scrutiny because they infringe on the Fourteenth Amendment's guarantee of due process by denying same-sex couples' fundamental right to recognition of their ongoing marriages. Petitioners' interest in legal respect for their existing marriages should also be understood as a protected liberty interest even if it were not an aspect of fundamentally protected marriage rights. Recognition of Petitioners' validly entered marriages wherever they may live, work, or travel is essential to the ordered liberty our Constitution protects.

3. The recognition bans should be subjected to heightened scrutiny under the Equal Protection Clause as well. The Court should make explicit what is already implicit in its precedents: that government discrimination targeting gay people, as the Ohio recognition bans do, is presumptively impermissible. A contrary presumption—that such discrimination is legitimate and subject to the same level of review applied to routine economic regulation—demeans the equal dignity of gay people and should be rejected. Classifications on the basis of sexual orientation have all the hallmarks to which this Court has pointed in concluding that laws targeting vulnerable groups of

people demand special scrutiny. Moreover, heightened scrutiny is also appropriate because the recognition bans discriminate on the basis of sex.

4. Even without heightened scrutiny, Ohio's recognition bans do not pass constitutional muster under any standard of review. The purported state interests in deferring to the democratic process, proceeding cautiously, or upholding tradition are all circular attempts to justify maintaining the discriminatory status quo for its own sake. They are not "independent and legitimate" state interests that can justify discrimination. *Romer*, 517 U.S. at 633. And any arguments based on "irresponsible procreation" or "optimal parenting" are logically incoherent and factually insupportable.

ARGUMENT

I. The Recognition Bans Are Unconstitutional Under *Windsor*

Ohio's recognition bans strip married same-sex spouses and their children of hundreds of legal and financial protections, as well as the security and dignity conferred by marriage. They do so in order to ensure that same-sex spouses remain unequal to all other married spouses. As in *Windsor*, the recognition bans' "design, purpose, and effect," *Windsor*, 133 S. Ct. at 2689, are to single out a class of persons and deny them "a dignity and status of immense import," *id.* at 2692, depriving same-sex spouses and their families of constitutionally protected liberty and equality. And, as in *Windsor*, the recognition bans are unconstitutional.

A. The Recognition Bans' "Design, Purpose, And Effect" Are To Impose Inequality

1. The text of the recognition bans target the same narrow class of persons DOMA's text targeted. *Windsor* held that DOMA denied same-sex couples equal protection because DOMA's "text" evinced the design to "interfere[] with the equal dignity of same-sex marriages." *Id.* at 2693. On its face, DOMA singled out "same-sex marriages made lawful by ... the States" for "restrictions and disabilities." *Id.* at 2695. The plain text of Ohio's recognition bans, like DOMA's, singles out same-sex couples among all who married out of state and denies them the legal protections, security, and dignity of their marriages. The recognition bans' text therefore exhibits the constitutionally impermissible design to erase the dignity and status conferred on married same-sex couples by other states.

2. *Windsor* also invalidated DOMA because DOMA's "purpose" was "to restrict the freedom and choices of couples married under" "state same-sex marriage laws." *Ibid.* That purpose was evident from DOMA's legislative history, which was peppered with references to "defend[ing]" "heterosexual marriage" and "protecting the traditional moral teachings of heterosexual-only marriage laws." *Ibid.* The express purpose invoked by proponents of Ohio's recognition bans mimicked the purpose invoked by DOMA's supporters less than a decade before—"to impose inequality" and "to identify a subset of state-sanctioned marriages and make them unequal." *Id.* at 2693, 2694. Ohio legislators enacted the recognition bans to prevent same-sex relationships from becoming "equal to everyone else's." J.A. 108.

The primary sponsor of the constitutional amendment asserted a central purpose "to protect Ohio from the 'inherent dangers of the homosexual activists' agenda.'" Pet. App. 167a. In the official ballot report, the amendment's proponents asserted it would "restrict [] governmental bodies in Ohio from ... giv[ing] official status, recognition and benefits to homosexuals and other deviant relationships that seek to imitate marriage." J.A. 170. Voters were urged to support the amendment "to protect marriage against those who would alter and undermine it." J.A. 170.

The context in which the recognition bans were enacted likewise makes clear that their entire point was to brand marriages of same-sex spouses as unequal. Preventing recognition of otherwise lawful out-of-state marriages was not merely benign perpetuation of "thousands of years of adherence to the traditional definition of marriage." Pet. App. 37a. The bans were not enacted far in the past when "many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage." *Windsor*, 133 S. Ct. at 2689. They came eight years *after* DOMA, and, like DOMA, were reactions to progress in a few states to win legal protections for same-sex relationships. *Id.* at 2682; *State v. Brown*, 849 N.E.2d 44, 46 (Ohio Ct. App., Stark Cnty. 2006); J.A. 98-103. The bans came on the heels of *Goodridge*, which extended marriage rights to same-sex couples in Massachusetts, 798 N.E.2d 941, as well as this Court's landmark decision in *Lawrence v. Texas*, affirming the liberty of lesbians and gay men to engage in sexual intimacy and form "a personal bond

that is more enduring." 539 U.S. 558, 567 (2003). In the face of growing national acceptance of same-sex couples, Ohio lawmakers sought to ensure that same-sex couples in Ohio would not be treated with equal respect and would be denied even the possibility of equal status under the law. This is precisely what equal protection prohibits. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (government action that has "selected or reaffirmed a particular course of action" because of its "adverse effects upon an identifiable group" offends equal protection).

Ohio's impermissible purpose is also emblazoned on the title of the act itself: the proponents titled it the "Marriage Protection Amendment," J.A. 170, and it is known in Ohio as the "Defense of Marriage Amendment." *Brown*, 849 N.E.2d at 46. That same title was a mark against DOMA in *Windsor*. 133 S. Ct. at 2693.

Thus, "[t]he history of" the recognition bans' "enactment and [their] own text demonstrate that interference with the equal dignity of same-sex marriages ... conferred by the States ... [is] more than an incidental effect[.]" *Ibid.* It is the recognition bans' very "essence." *Ibid.*

Faced with similar evidence that DOMA impermissibly sought to make marriages of same-sex couples unequal, *Windsor* held DOMA unconstitutional. As this Court explained, "no legitimate purpose overcomes the purpose ... to disparage and to injure those whom the State ... sought to protect in personhood and dignity." *Id.* at 2696. For the same reasons, the recognition bans are unconstitutional.

Acknowledging that the purpose of the recognition bans is to impose inequality does not brand individual legislators or voters as "hate-mongers," Pet. App. 45a, or "monsters." *Windsor*, 133 S. Ct. at 2711 (Scalia, J., dissenting). Unconstitutional discrimination "rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring); *see also Romer*, 517 U.S. at 632-35; *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) ("mere negative attitudes, or fear" cannot justify singling out one group for unequal treatment). It can also arise from "profound and deep convictions." *Lawrence*, 539 U.S. at 571. Nevertheless, even in matters on which "[m]en and women of good conscience can disagree," this Court's obligation is "to define the liberty of all," not to enforce a particular "moral code." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992); *see Lawrence*, 539 U.S. at 571.

3. *Windsor* also held DOMA unconstitutional because its "practical effect" was to "impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States." 133 S. Ct at 2693. DOMA disqualified married same-sex spouses, widows, widowers, and their children from government protections and responsibilities under more than 1,000 federal laws, ranging from the "mundane to the profound." *Id.* at 2694. The recognition bans similarly result in far-reaching

burdens on married couples' lives. Like DOMA, they sweep broadly into all manner of financial, medical, and personal family matters, covering protections related to birth, death, and most everything in between.

For example, if Ohio recognized the Petitioner couples' marriages, it would also recognize both spouses in each couple as the parents of their children and would issue birth certificates naming both parents. *See* Ohio Rev. Code Ann. §§ 3111.95(A), 3705.09(F)(1); J.A. 453-456. By depriving children of same-sex spouses of accurate birth certificates, Ohio interferes with the parents' ability to protect and provide for their children. A birth certificate is the only common government-conferred record that establishes identity, parentage, and citizenship in one document; is not confidential (in the way adoption decrees often are); and is uniformly recognized, readily accepted, and often required in an array of legal contexts. And by denying legal recognition to the parental status and obligations of same-sex spouses, the recognition bans expose children to the risk of losing one parent's financial support should the couple separate or the recognized parent pass away. *See* Pet. App. 132a-133a.

The recognition bans also prevent married same-sex couples in Ohio from accessing important protections under some federal programs. For example, a surviving spouse is eligible for her spouse's level of Social Security retirement benefits only if the state where they were domiciled recognizes her marriage. *See* 42 U.S.C. § 416(h)(1). Eligibility for certain spousal veterans' benefits also

requires marriage recognition by the state of residence. *See* 38 U.S.C. § 103(c). While Ohio welcomes other newlyweds home with open arms, it meets married same-sex couples with government condemnation of their families that excludes them from critical federal protections.

Ohio's recognition bans thus destroy the "stability and predictability of basic personal relations [a] State has found it proper to acknowledge and protect" when a same-sex couple married elsewhere crosses the Ohio border. *Windsor*, 133 S. Ct. at 2694. For same-sex couples living outside the state, a road trip to visit relatives, a short drive to work, or a visit to an Ohio hospital all risk erasing their marriages and the protections that come with them. The discriminatory impact of Ohio's bans is felt across the country as same-sex married couples and their children bear the anxiety that, in an instant of unexpected heartache, they may be treated as legal strangers.

Lawfully married couples and their families should be able to rely on the protections that come with spousal rights, parentage, and laws of intestacy. Because of the recognition bans, married same-sex couples instead must find the means to compile a portfolio of adoption decrees (where not prohibited by state law as in Ohio), medical and personal powers of attorney, advance directives, wills, and other legal documents to protect themselves as best they can against a potential family tragedy in Ohio. But these private documents provide only a small fraction of the cradle-to-grave protections Ohio law automatically bestows on families through the

marriages it chooses to recognize. J.A. 267-289, 453-456.

Petitioner Obergefell's story tragically illustrates the point. When a same-sex spouse such as John Arthur dies within Ohio, the state issues a death certificate proclaiming that he died "single" and forever obliterating his surviving spouse from the last official record of his life. J.A. 36-37, 268.

Even when couples remain outside Ohio, the recognition bans demean and undermine their families from afar. For the Vitale-Talmas family who reside in New York, the Ohio recognition bans deny one parent's existence on their son's Ohio-issued birth certificate. Ohio insists that Adopted Child Doe must grow up with an inaccurate birth certificate that makes it harder for his parents to educate him, travel with him, and secure medical care for him. J.A. 406, 453-456. From hundreds of miles away, the bans improperly "visit[] condemnation" on Adopted Child Doe "in order to express [Ohio's] disapproval of [his] parents." *Mathews v. Lucas*, 427 U.S. 495, 505 (1976). The bans thus cast their long shadow into states that have "decided that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons." *Windsor*, 133 S. Ct. at 2689. They place same-sex couples in Ohio and beyond "in an unstable position of being in a second-tier marriage," and "make[] it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Id.* at 2694.

4. *Windsor* also gave "careful consideration" to DOMA's purpose and effects because it departed from the "long-established precept" in our federal system of recognizing marriages from the various states. *Id.* at 2692. Before DOMA, the federal government recognized marriages regardless of differences among state marriage laws. Ohio's recognition bans warrant similarly searching review because they deviated from the rich tradition, historically followed by all the states, that a marriage valid where celebrated is valid everywhere, even if the marriage could not have been entered in the forum state. Because the bans replicate "DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage," they warrant careful judicial review. *Id.* at 2693.

The extensive protections for existing marital relationships are reflected in the bedrock principle of American law that a marriage valid where celebrated is valid everywhere. *See, e.g.*, Fletcher W. Battershall, *The Law of Domestic Relations in the State of New York* 7-8 (1910) (describing "permission or prohibition of particular marriages, of right belongs to the country where the marriage is to be celebrated" as a "universal practice of civilized nations"). Certainty that a marital status once obtained will be universally recognized has long been understood to be of fundamental importance both to the individual and to society more broadly. *See Madewell v. United States*, 84 F. Supp. 329, 332 (E.D. Tenn. 1949) (The "policy of the civilized world ... is to sustain marriages, not to upset them."); *see also* Section II, below.

To be sure, cases applying the place of celebration rule often articulate an exception to the rule if the out-of-state marriage would violate an extremely strong public policy of the state. Historically this generally meant the marriage and concomitant sexual relations between the spouses were so condemned as to be criminal if occurring within the state. Nationwide, until the recent enactment of laws targeting same-sex couples, the public policy exception had grown largely obsolete. J.A. 255. Thus in historical and contemporary times, with limited exceptions—most notably now-discredited anti-miscegenation laws (*see* Section II)—Ohio and states around the nation have followed a universal standard to honor marriages wherever entered, even when the marriage was contrary to the domicile state's public policy and express law. *See* Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. Pa. L. Rev. 2215, 2220-21 (2005). In reality, the public policy exception has been applied infrequently to invalidate a marriage valid where entered. Barbara J. Cox, *Same-Sex Marriage and the Public Policy Exception in Choice-of-Law: Does It Really Exist?*, 16 Quinnipiac L. Rev. 61, 67-68 (1996).

Until the 2004 recognition bans, Ohio faithfully adhered to this principle, which has been an especially robust feature of the State's marriage protections. "[I]t is absolutely clear that under Ohio law, from the founding of the state through at least 2004, the validity of a heterosexual marriage is to be determined by whether it complies with the law of the jurisdiction where it was celebrated." Pet. App. 190a. This was true even if the marriage was "clearly contrary to Ohio law and entered into by

Ohio residents with the purpose of evading Ohio law." J.A. 247. For example, Ohio recognizes the out-of-state marriages of first cousins and minors, even though it is illegal for first cousins or minors to marry in Ohio. Pet. App. 191a; *Mazzolini v. Mazzolini*, 155 N.E.2d 206 (Ohio 1958) (first cousins); *Peefer v. State*, 182 N.E. 117 (Ohio Ct. App., Greene Cnty. 1931) (minors); *see also Dennis v. R.R. Ret. Bd.*, 585 F.2d 151, 156 (6th Cir. 1978).[5] Neither Petitioners, Respondent, nor the courts below identified a single case in which Ohio actually denied recognition to the out-of-state marriage of a different-sex couple. *See* J.A. 255.

The recognition bans' exemption of marriages of same-sex spouses from the longstanding place of celebration rule by labelling those marriages contrary to "strong public policy" simply underscores the State's purpose to brand same-sex spouses as unequal. Ohio Rev. Code Ann. § 3101.01(C).

B. *Windsor*'s Principles Apply To State As Well As Federal Marriage Recognition Bans

The Sixth Circuit denied *Windsor*'s obvious relevance to this case, characterizing this Court's ruling as hinging on federalism concerns about DOMA's intrusion into state sovereignty. Pet. App. 53a-55a. But *Windsor* made clear that it was "unnecessary to decide whether" the federal intrusion on state power itself "is a violation of the

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[5] Until adoption of their own marriage bans targeting same-sex couples, Kentucky, Michigan, and Tennessee similarly adhered to the universal place of celebration rule. *See, e.g.*, *Stevenson v. Gray*, 56 Ky. 193, 207-08 (Ct. App. 1856); *In re Miller's Estate*, 214 N.W. 428, 429 (Mich. 1927); *Keith v. Pack*, 187 S.W.2d 618, 618 (Tenn. 1945).

Constitution," because DOMA unjustifiably discriminated against same-sex spouses lawfully married in other states—just as Ohio's bans do. 133 S. Ct. at 2692; *see also id.* at 2709-10, (Scalia, J., dissenting) (observing that *Windsor*'s reasoning would apply to states).

Indeed, *Windsor* confirmed that federalism interests do not free states to trammel the constitutional marriage rights of the individual. While acknowledging that "the definition and regulation of marriage has ... been treated as being within the authority and realm of the separate States," *id.* at 2689-90, the Court also noted that "[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons." *Id.* at 2691; *see also id.* at 2692; *Latta*, 771 F.3d at 474; *Baskin*, 766 F.3d at 671; *Bostic*, 760 F.3d at 378-80; *Kitchen*, 755 F.3d at 1228. This is consistent with the fundamental principle that "[t]he State cannot demean the[] existence" of persons, including same-sex couples. *Lawrence*, 539 U.S. at 578. "The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects." *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014); *see also Kitchen*, 755 F.3d at 1228-29. Ohio's recognition bans do just that.

Ohio's recognition bans also infringe the sovereignty of *other* states that have seen fit to confer the status of marriage on same-sex couples. This infringement extends even beyond disrespect for the marriages of those, like the Vitale-Talmases, who reside in the state in which they wed. In fealty to its recognition bans, Ohio even refuses to honor sister

state judgments granting adoptions to same-sex couples, as it did in refusing to honor Adopted Child Doe's New York adoption decree. Pet. App. 153a-157a n.i. The federal Constitution transformed the "several States ... into a single, unified Nation." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 322 (1981) (Stevens, J., concurring). Ohio's bans work to undermine that essential feature of federalism.

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Windsor makes clear why Ohio's recognition bans are unconstitutional. Like DOMA, the "design, purpose, and effect" of the bans is to exclude married same-sex couples and their families from rights and protections even "approximating" those of marriage, departing from the long practice of the "civilized world" to recognize, not erase, validly-entered marriages. Motivated by an impermissible purpose to impose inequality, the recognition bans do not survive the careful consideration *Windsor* requires.

II. Ohio's Refusal To Recognize Existing Marriages Of Same-Sex Couples Is Subject To Heightened Scrutiny Under The Due Process Clause

When a couple marries, the state "confer[s] ... a dignity and status of immense import," through an "exercise of [the state's] sovereign power." *Windsor*, 133 S. Ct. at 2692, 2693. Once that status is created, the Due Process Clause protects the relationship from unjustified attempts to "divest[]" the couple "of the duties and responsibilities that are an essential part of married life." *Id.* at 2695. Whether that protection is understood as a distinct aspect of the fundamental rights of marriage or as a protected liberty interest that stems from the importance of being married in our society, "there is a sphere of

privacy or autonomy surrounding *an existing marital relationship* into which the State may not lightly intrude...." *Zablocki v. Redhail*, 434 U.S. 374, 397 n.1 (1978) (Powell, J., concurring) (emphasis added)). The ongoing relationship receives constitutional protection because only when the wedding is over, the guests are gone, and the couple returns home as spouses does marriage as "a way of life" commence. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

Being married would mean little if the government were free to refuse all recognition to a couple's marriage once the vows are made and the license is signed. When a couple knits their lives together through marriage, making promises of enduring support and care, they vow to be wed until death—not *state lines*—"do us part." Regardless of whether this Court agrees that same-sex couples have a constitutionally protected right to enter into civil marriage in the first instance—and Petitioners profoundly believe they do—the Court should nevertheless conclude that, *once lawfully married*, same-sex couples have a protected liberty interest, and, indeed, a fundamental right, to *ongoing recognition* of their marriages throughout the nation.[6]

1. Petitioners have a fundamental right to protection and recognition for their validly-entered marriages—in other words, a right to *be* and *remain*

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[6] A ruling that a state may not constitutionally withhold the right to marry within the state to same-sex couples would necessarily require that states recognize within their borders the out-of-state marriages of same-sex couples. There could be no legitimate justification to refuse recognition to out-of-state marriages permitted within the state.

married. *Loving* made clear that couples have fundamental rights to have their marriages accorded legal recognition and protection not just in the jurisdiction in which they married, but also across state lines. Indeed, *Loving* struck down not only Virginia's law prohibiting interracial marriages within the state, but also its statutes denying recognition to and criminally punishing such marriages entered outside the state. 388 U.S. at 4, 12. It did so in a case involving a couple *already* married, who, after celebrating their nuptials in the District of Columbia, were prosecuted on returning to their Virginia home for their out-of-state marriage. *Id.* at 2-3. Significantly, this Court held that Virginia's statutory scheme, including its penalties on out-of-state marriages and voiding of marriages obtained elsewhere, "deprive[d] the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment." *Id.* at 12. Like Richard Loving and Mildred Jeter's marriage, Petitioner couples' existing marriages reflect their life-long commitment essential to their "pursuit of happiness." *Ibid.* (citation omitted).

As *Loving* illustrates, the fundamental rights of marriage protected by due process are not limited to receiving marriage licenses. The freedom to select the spouse of one's choice receives constitutional protection precisely because of the expectation that this will be the single person with whom one will travel through life, sharing profound intimacy and mutual support through life's good times and bad. *See ibid.*; *see also Hodgson v. Minnesota*, 497 U.S. 417, 435 (1990); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974). Marriage's "important attributes" unfold, and need protection, over time.

These attributes include "expressions of emotional support and public commitment," for some "an exercise of religious faith as well as an expression of personal dedication," and "pre-condition to the receipt of government benefits." *Turner v. Safley*, 482 U.S. 78, 95-96 (1987). As this Court has said, marriage is an "enduring" bond, a commitment to remain "together for better or for worse," "a bilateral loyalty," "an association for [a] noble ... purpose." *Griswold*, 381 U.S. at 486. This constitutionally-protected "status is a far-reaching legal acknowledgment of the intimate relationship between two people," *Windsor*, 133 S. Ct. at 2692, a commitment of enormous import that legally recognized spouses carry wherever they go throughout their married lives and even after one of them dies.

Ohio's recognition bans utterly disregard and disrespect the lawful marriages of same-sex couples entered elsewhere, striking at the heart of this right. Thus, as the Fourth and Tenth Circuits and many lower courts have held, a state's refusal to recognize a marriage lawfully licensed and performed out of state between two people of the same sex violates the Fourteenth Amendment guarantee of due process. *See, e.g.*, *Bostic*, 760 F.3d at 377; *Kitchen*, 755 F.3d at 1213 (collecting authorities); *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1288-89, 1293 (N.D. Fla. 2014), *appeals docketed*, Nos. 14-14061-AA, 14-14066-AA (11th Cir.); *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 424 (M.D. Pa. 2014) (collecting authorities).

2. Even if it were not an aspect of the fundamental right of marriage, Petitioners' interest in legal respect for their existing marriages should

still be understood as a protected liberty interest. This Court has recognized that "choices to ... maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984). "Protecting these relationships from unwarranted state interference ... safeguards the ability independently to define one's existence that is central to any concept of liberty." *Id.* at 619. Petitioners' interests in their existing marriages are precisely the type of "associational rights" this Court has repeatedly confirmed protect an individual's "choices about marriage, family life, and the bringing up of children." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996). These choices are "sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *Ibid.* Only a weighty governmental purpose served by denying recognition to Petitioners' marriages could counterbalance the bans' extraordinary intrusion on Petitioners' liberty interests. *See, e.g., Youngberg v. Romeo*, 457 U.S. 307, 320 (1982).

Indeed, as noted above, the place-of-celebration rule reflects the expectation that one's marriage will be universally recognized and is so deeply rooted in our nation's history as to be "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotations and citations omitted); *see also Williams v. North Carolina*, 317 U.S. 287, 299 (1942) (being married in one state and unmarried in another would be one of "the most perplexing and distressing complication[s]

in the domestic relations of ... citizens." (internal quotations and citation omitted)). For this reason, it is an essential feature of American law, enshrined in common law and legislation as a pillar of domestic relations jurisprudence. *See, e.g.*, Joseph Story, *Commentaries on the Conflict of Laws* § 113, at 187 (8th ed. 1883).

Throughout our history, the fact of being married has brought with it a wide swath of protections, reflecting two spouses' uniquely interdependent and enduring relationship. These range from rights in matters of sexual intimacy and reproduction, *Griswold*, 381 U.S. 479; to marital presumptions of parentage shielding the marital family from intrusions even by a marital child's genetic parent, *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989); to "protection of marital confidences, regarded as so essential to the preservation of the marriage relationship," *Wolfle v. United States*, 291 U.S. 7, 14 (1934); to access to "government benefits ..., property rights ..., and other, less tangible benefits." *Turner*, 482 U.S. at 96.

The Fourteenth Amendment's constraints against state deprivations of individual liberties also have an interstate unifying dimension, requiring all states to satisfy a common threshold of respect for the liberties of Americans wherever they may marry, live, have their children, or travel. "[T]he nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the ... land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Shapiro v.*

Thompson, 394 U.S. 618, 629 (1969).[7] This unifying function plays a particularly critical role in the marriage context, where two individuals in our highly mobile society commit to be bound together in a life-long status of profound personal and legal significance that transcends state borders.

The guarantee of due process thus prohibits subjecting spouses to rejection of their lawfully obtained marital status when they cross state lines unless strong state interests outweigh the substantial harms that would cause.

III. Ohio's Recognition Bans Trigger Heightened Equal Protection Scrutiny Because They Discriminate Based on Sexual Orientation and Sex

A. No Presumption Of Constitutionality Should Apply To Sexual Orientation Discrimination

This Court should make explicit what is already implicit in its holdings: that government discrimination based on sexual orientation is not entitled to the presumption of constitutionality described in *FCC v. Beach Communications*, 508 U.S. 307 (1993), and similar cases. This Court's decisions in *Windsor*, *Lawrence*, and *Romer* implicitly repudiated the notion that discrimination based on sexual orientation is presumptively legitimate. *See Windsor*, 133 S. Ct. at 2706 (Scalia, J., dissenting). Whether by balancing the harms to gay people

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[7] Petitioners agree with the arguments asserted in the Tennessee petitioners' brief based on the right to travel, which is an additional source of protection requiring at least a weighty justification for a state's refusal to respect marriages same-sex couples lawfully entered elsewhere.

against the government's asserted interests, *Baskin*, 766 F.3d at 656-60; employing the traditional tiers of scrutiny, *Windsor v. United States*, 699 F.3d 169, 181-85 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013); or requiring the government to establish that a "legitimate purpose overcomes" the injury that its discrimination inflicts on same-sex couples, *Windsor*, 133 S. Ct. at 2696, the Court should at a minimum require the government to justify the harms inflicted by sexual orientation-based discrimination. *Baskin*, 766 F.3d at 671 ("'*Windsor*'s balancing is not the work of rational basis review.'" (quoting *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 483 (9th Cir. 2014))).

Making explicit that laws discriminating on the basis of sexual orientation are not presumptively constitutional is necessary to affirm the equal dignity of gay people. Although the bans are unconstitutional under any standard of review, without clarification that sexual orientation discrimination warrants judicial skepticism, "some might question whether [the discrimination] would be valid if drawn differently." *Lawrence*, 539 U.S. at 575.

When judges declare that it is presumptively legitimate for the government to treat people differently based solely on their sexual orientation, "that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Lawrence*, 539 U.S. at 575. The judicial presumption that comes with rational basis review is "practically a brand upon" lesbians and gay men, "affixed by the law, an assertion of their inferiority." *J.E.B. v.*

Alabama ex rel. T.B., 511 U.S. 127, 142 (1994) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)). It tells gay people, their families, and everyone with whom they interact that laws infringing on their personhood should be viewed with no more skepticism than laws regulating packaged milk. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

The presumption that discrimination based on sexual orientation is constitutional is a continuing harmful legacy of this Court's overruled decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986). Before *Bowers*, lower court judges and Justices of this Court had begun to recognize that discrimination based on sexual orientation required some form of heightened scrutiny as part of either due process or equal protection. *See Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1009-18 (1985) (Brennan, J., dissenting from denial of cert.) (applying heightened scrutiny based on both due process and equal protection); *Beller v. Middendorf*, 632 F.2d 788, 807 (9th Cir. 1980) (Kennedy, J.) (applying due process balancing test); *Rich v. Sec'y of Army*, 735 F.2d 1220, 1227 (10th Cir. 1984) (adopting *Beller* framework). But *Bowers* brought an abrupt halt to that lower court jurisprudence when it erroneously upheld the constitutionality of criminal sodomy laws. *See* Arthur S. Leonard, *Exorcizing the Ghosts of Bowers v. Hardwick: Uprooting Invalid Precedents*, 84 Chi.-Kent L. Rev. 519, 526 (2009). As *Lawrence* held, "*Bowers* was not correct when it was decided, and it is not correct today." 539 U.S. at 578. Lower court precedent that still applies rational basis review and extends a presumption of constitutionality to government discrimination based on sexual

orientation continues to "demean[] the lives of homosexual persons," just as *Bowers* itself did, and should be squarely overruled. *Id.* at 575.

B. Explicitly Rejecting A Presumption Of Constitutionality For Sexual Orientation Discrimination Is Consistent With The Court's Established Jurisprudence For Identifying "Suspect" And "Quasi-suspect" Classifications

Some classifications "are so seldom relevant to the achievement of any legitimate state interest" that their use triggers searching judicial review. *Cleburne*, 473 U.S. at 440. Sexual orientation classifications should be among them. In identifying such classifications, the Court has examined most closely whether the class has experienced a history of discrimination and whether the defining characteristic of the class bears any relation to ability to contribute to society. The Court has also sometimes considered whether any distinguishing or immutable characteristic defines the group and whether the group has sufficient political power to protect itself from the majority. *See id.* at 440-41; *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987). As three circuits and numerous federal district and state courts have recently recognized, and as the United States has argued, heightened scrutiny should apply to government classifications on the basis of sexual orientation.[8]

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[8] *See Baskin*, 766 F.3d at 654-55; *SmithKline*, 740 F.3d at 480-84 (finding heightened scrutiny applicable to sexual orientation without examining the four factors); *Windsor*, 699 F.3d at 181-85; *Whitewood*, 992 F. Supp. 2d at 425-30; *Wolf v. Walker*, 986 F. Supp. 2d 982, 1011-14 (W.D. Wis. 2014), *aff'd sub nom.*

Articulating a heightened standard for sexual orientation classifications now would be consistent with the Court's gradual recognition in the past that classifications based on gender and "illegitimacy" should be treated as quasi-suspect. This Court initially subjected those classifications to rational basis review. *See Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Reed v. Reed*, 404 U.S. 71 (1971). But experience showed that those classifications "generally provide[d] no sensible ground for differential treatment," *Cleburne*, 473 U.S. at 440, and should therefore be approached with heightened judicial suspicion rather than presumed constitutional. *Id.* at 441-42.

1. Gay people have suffered a long history of discrimination. Indeed, "homosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world." *Baskin*, 766 F.3d at 658. Until recently, the marginalization of gay people included laws criminalizing their sexual intimacy, *Lawrence*, 539 U.S. 558; barring them from government jobs, *Rowland*, 470 U.S. 1009; and preventing their entry into the United States. *Boutilier v. INS*, 387 U.S. 118 (1967). *See* J.A. 176-225.

Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014); *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 310-33 (D. Conn. 2012); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 985-90 (N.D. Cal. 2012); *Griego v. Oliver*, 316 P.3d 865, 879-84 (N.M. 2013); *Varnum v. Brien*, 763 N.W.2d 862, 885-96 (Iowa 2009); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 425-54 (Conn. 2008); *In re Marriage Cases*, 183 P.3d 384, 441-44 (Cal. 2008); *see also* Brief on the Merits for the United States, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 683048, *18-36.

Acknowledging a history of discrimination against gay people, the Sixth Circuit nonetheless deemed it irrelevant because "[t]he traditional definition of marriage goes back thousands of years and spans almost every society in history," while "'American laws targeting same-sex couples did not develop until the last third of the 20th century.'" Pet. App. 53a (quoting *Lawrence*, 539 U.S. at 570). The court concluded that "[t]his order of events prevents us from inferring from history that prejudice against gays led to the traditional definition of marriage." Pet. App. 53a.

The Sixth Circuit's historical analysis is wrong. Invidious discrimination against lesbians, gay men, and bisexuals did not begin in the 1970s with Anita Bryant or criminal laws targeting gay people specifically. *See Baskin*, 766 F.3d at 664-65. *Lawrence* itself noted that "for centuries there have been powerful voices to condemn homosexual conduct as immoral," based on "religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family." 539 U.S. at 571. Those "powerful voices" long predate this country's founding, *id.* at 568, and they continue to this day, including in the form of Ohio's bans and many others like them.

The Sixth Circuit's reasoning also inverts the proper heightened scrutiny analysis. In determining whether a classification requires closer scrutiny, courts must "look to the likelihood that governmental action premised on a particular classification is valid *as a general matter*, not merely to the specifics of [the particular] case." *Cleburne*, 473 U.S. at 446 (emphasis added). Under this Court's suspect classification framework, as long as the history of

discrimination exists, it makes no difference whether the law that is challenged is ancient or modern, the clear product of that history or a disconnected invention. Indeed, one of the purposes of heightened review is to guard against laws based "upon 'old notions' and 'archaic and overbroad' generalizations" that perpetuate historical patterns of discrimination into the modern era. *Califano v. Goldfarb*, 430 U.S. 199, 211 (1977); *accord J.E.B.*, 511 U.S. at 139 n.11. Heightened review is designed to "smoke out" improper discrimination without the need for direct evidence of prejudice every time the classification is used. *Johnson v. California*, 543 U.S. 499, 506 (2005).

2. The other essential consideration in the Court's heightened scrutiny analysis—one that the Sixth Circuit ignored—is whether a group is distinctively different from other groups in a way that "frequently bears [a] relation to ability to perform or contribute to society." *Cleburne*, 473 U.S. at 440-44 (citation omitted); *see also Frontiero*, 411 U.S. at 686 (plurality) ("[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.").

Sexual orientation likewise does not bear on an individual's ability to perform in or contribute to society. J.A. 303-305. "There are some distinguishing characteristics ... that may arguably inhibit an individual's ability to contribute to society, at least in some respect. But homosexuality is not one of them." *Windsor*, 699 F.3d at 182

(distinguishing *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 316 (1976), and *Cleburne*, 473 U.S. at 442). Because a person's sexual orientation "tend[s] to be irrelevant to any proper legislative goal," *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982), courts should not presume that governmental reliance on such a classification is constitutional.

3. In determining whether a classification warrants heightened scrutiny, courts have also considered whether laws discriminate on the basis of "obvious, immutable, or distinguishing characteristics that define [persons] as a discrete group.'" *Bowen*, 483 U.S. at 602 (internal quotation marks and citation omitted).

As the Second Circuit observed, there is no doubt that sexual orientation is a distinguishing characteristic that can invite "discrimination when it is manifest." *Windsor*, 699 F.3d at 183; *see also* J.A. 295-297. Moreover, the broad medical and scientific consensus is that sexual orientation "is an immutable (and probably an innate, in the sense of in-born) characteristic rather than a choice." *Baskin*, 766 F.3d at 657; *see also* J.A. 300-303.[9]

More fundamentally, in refusing to distinguish between engaging in same-sex intimate conduct and the status of being gay, this Court recognized that sexual orientation is a core component of a person's

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[9] There is no requirement that a characteristic be immutable in a literal sense in order to trigger heightened scrutiny. Heightened scrutiny applies to classifications based on alienage and "illegitimacy," even though both classifications "are actually subject to change." *Windsor*, 699 F.3d at 183 n.4; *see Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (rejecting argument that alienage did not deserve strict scrutiny because it was mutable).

identity. *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 689 (2010) ("Our decisions have declined to distinguish between status and conduct in this context." (*citing Lawrence*, 539 U.S. at 575, and *id.* at 583 (O'Connor, J., concurring in judgment))). As courts have recognized, one should not be forced to choose between one's sexual orientation and one's rights as an individual—even if such a choice could be made. *See Wolf*, 986 F. Supp. 2d at 1013 ("[R]egardless whether sexual orientation is 'immutable,' it is fundamental to a person's identity, which is sufficient to meet this factor." (internal quotation marks and citations omitted)).

4. The final factor courts sometimes consider is whether the classified group lacks political power to protect itself from discrimination. Like immutability, lack of political power is not essential for recognition as a suspect class. *Windsor*, 699 F.3d at 181. Nonetheless, lesbians and gay men are clearly a numerical minority and "are not in a position to adequately protect themselves from the discriminatory wishes of the majoritarian public." *Id.* at 185.

The Sixth Circuit pointed to recent progress by gay people in challenging statutory and constitutional restrictions on marriage as evidence of their political power. But if the limited successes the court cited were sufficient to disqualify a group from the protection of heightened scrutiny, *Frontiero* would not have applied such scrutiny to classifications based on sex in 1973. 411 U.S. at 688 (plurality). When *Frontiero* was decided, Congress had already passed Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963 to protect women

from discrimination in the workplace. *See id.* at 687-88. In contrast, there is still no express federal ban on sexual orientation discrimination in employment or housing, and 29 states similarly lack such protections. J.A. 333, 336. As political power has been defined by the Court for purposes of heightened scrutiny analysis, gay people do not have it.

In addition, the Sixth Circuit's focus on some progress obscures the larger reality of defeat after defeat. Beginning in 1974 and continuing through December 2014, basic civil rights protections have often been stripped from gay people by numerous referenda. *See Romer*, 517 U.S. 620; *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); J.A. 338-343. And since 1998, ballot measures amending state constitutions to prevent gay people from securing marriage rights have passed in 30 states. Nat'l Conference of State Legislatures, *Same-Sex Marriage and Domestic Partnerships On The Ballot* (Nov. 2012), http://www.ncsl.org/research/elections-and-campaigns/same-sex-marriage-on-the-ballot.aspx (last visited Feb. 25, 2015).

This repeated use of majoritarian "direct democracy" to disadvantage a single minority group is extraordinary in our nation's history. Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 Am. J. Pol. Sci. 245, 257-60 (1997); *see also* Donald P. Haider-Markel et al., *Lose, Win, or Draw? A Reexamination of Direct Democracy and Minority Rights*, 60 Pol. Res. Q. 304 (2007). This is not, as the Sixth Circuit claims, "an eleven-year record marked by nearly as many successes as defeats." Pet. App. 57a. It is a record of thousands of years in which equality for gay people was unthinkable, followed by

45 years of political struggle in which gay people have made any meaningful progress only very recently, and, even then, hardly securely.

In short, sexual orientation classifications demand heightened scrutiny not just under the two critical considerations, but under all four considerations this Court has used to identify suspicious classifications.

C. Ohio's Recognition Bans Also Discriminate Based On Sex And Warrant Heightened Scrutiny On That Basis

"'[A]ll gender-based classifications today' warrant 'heightened scrutiny.'" *United States v. Virginia*, 518 U.S. 515, 555 (1996) (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1992)). On their face, Ohio's recognition bans classify based on sex: James Obergefell's marriage to John Arthur would have been recognized had either been a woman, and Pamela Yorksmith's marriage to Nicole Yorksmith would have been recognized had either been a man. *See Latta*, 771 F.3d at 480 (Berzon, J., concurring); *see also Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1206 (D. Utah 2013), *aff'd*, 755 F.3d 1193 (10th Cir. 2014); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010); *Goodridge*, 798 N.E.2d at 971 (Greaney, J., concurring); *Baker v. State*, 744 A.2d 864, 911 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part); *Baehr v. Lewin*, 852 P.2d 44, 64 (Haw. 1993).

Like any other classification based on sex, the recognition bans are automatically subject to heightened scrutiny even if they give no preference to women or men. They nevertheless restrict the rights of both women and men as individuals based on their

sex. *Latta*, 771 F.3d at 482-84 (Berzon, J., concurring and collecting authorities).

On a deeper level, the recognition bans require heightened scrutiny because they rely on the same stereotypes about the relative capabilities of men and women that this Court has repeatedly rejected as constitutionally suspect. *Id.* at 485-86. Indeed, such bans are often defended based on the assertion that "gender complementarity" is necessary because, supposedly, "men and women 'naturally' behave differently from one another in marriage and as parents." *Id.* at 485, 491. "[T]hese proffered justifications simply underscore that the same-sex marriage prohibitions discriminate on the basis of sex, not only in their form ... but also in reviving the very infirmities that led the Supreme Court to adopt an intermediate scrutiny standard for sex classifications in the first place." *Id.* at 486.

IV. Ohio's Recognition Bans Fail Any Standard Of Review

Although heightened scrutiny is warranted, the Ohio bans fail *any* level of review. Even when rational basis review applies, this Court "insist[s] on knowing the relation between the classification adopted and the object to be obtained." *Romer*, 517 U.S. at 632. The justifications offered must have a "footing in the realities of the subject addressed by the legislation." *Heller v. Doe*, 509 U.S. 312, 321 (1993); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 533-38 (1973). And even when the government offers an ostensibly legitimate purpose, "[t]he State may not rely on a *classification* whose relationship to an asserted goal is so attenuated as to render the

distinction arbitrary or irrational." *Cleburne*, 473 U.S. at 446 (emphasis added).

Accordingly it is not enough to point to reasons why Ohio encourages different-sex couples to marry and respects their out-of-state marriages. A valid government justification must exist for why Ohio insists on denying respect to the out-of-state marriages of same-sex couples. *See, e.g., id.* at 448-50 (focusing on city's interest in *denying* housing for people with developmental disabilities, not merely its interest in *permitting* residence for others); *Eisenstadt v. Baird*, 405 U.S. 438, 448-53 (1972) (focusing on state's interest in *denying* unmarried couples access to contraception, not merely its interest in *granting* married couples access); *see also Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 618 (1985) ("When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause.").

None of the proffered justifications for Ohio's bans meets this standard. Indeed, the lack of any legitimate and plausible justification to deny same-sex spouses recognition of their marriages and protections for their children shows the bans to be "inexplicable by anything but animus toward the class" they affect. *Romer*, 517 U.S. at 632.

A. The Recognition Bans Cannot Be Upheld Based On The Discriminatory Status Quo

Defenders of the recognition bans rely on a related set of arguments that all boil down to this: a state majority's desire to withhold marriage rights from same-sex couples is sufficient reason in itself to preserve the ban. Whether labeled deference to state democratic processes and federalism, proceeding with

caution, or adherence to history and tradition, these arguments fail the basic requirement of equal protection—that a classification "bear a rational relationship to an independent and legitimate legislative end." *Id.* at 633. This fundamental requirement ensures that a law was not enacted "for the purpose of disadvantaging the group burdened by the law." *Ibid.* Yet the majority's choice to enact and adhere to the recognition bans merely describes how same-sex spouses and their families came to have their rights infringed by the recognition bans; it does not provide an independent and legitimate end in itself for that infringement.

1. *"Leave It To The State Democratic Process" Rationale*

Conceding the grave harms inflicted by the marriage bans on same-sex couples and their children, the Sixth Circuit nonetheless ruled that the decision whether to end these harms should remain in the hands of state voters. Pet. App. 40a, 69a.

A preference for majoritarian lawmaking, however, cannot override the constitutional rights of a minority. If it could, this Court would not have struck down the state constitutional amendment discriminating against gay people in *Romer* or the discriminatory ordinance in *Cleburne*. In striking down those discriminatory laws, this Court adhered to a foundational principle of our constitutional democracy, that the "independence of the Judges is equally requisite to guard the Constitution and the rights of individuals, from ... serious oppressions of the minor party in the community." *The Federalist No. 78*, at 437 (Alexander Hamilton) (Clinton Rossiter ed., 1961). This principle remains as vital

today as it was at the founding. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. ... [F]undamental rights may not be submitted to vote; they depend on the outcome of no elections." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943); *see also Windsor*, 133 S. Ct. at 2688; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

Furthermore, a decision upholding the recognition bans necessarily requires the Court to favor the democratic processes that denied marriage recognition in *some* states over the democratic processes that resulted in affirmation of the dignity and marriage rights of same-sex couples in *other* states. The constitutionally protected rights of lesbian and gay individuals to liberty and equality must tilt the scales in favor of marriage recognition.

While states have a wide berth to regulate domestic relations in our federal system, as this Court made clear in *Windsor*, they must do so within constitutional bounds. *See* 133 S. Ct. at 2690-91.

2. *"Wait And See" Rationale*

The Sixth Circuit also endorsed as a rational basis a state's desire to "wait and see" the long-range consequences of recognizing the marriages of same-sex couples. Pet. App. 36a; *see also* Appellant's Br. 46, ECF 21, Case No. 14-3464 (asserting there are "[u]nknowable [e]ffects" of recognizing Petitioners' marriages). But Ohio's approach is less a passive desire to "wait and see" than an affirmative attempt

to claw back the advances same-sex couples have achieved in other states. Some states have already granted same-sex couples the legal status and dignity of marriage, and Ohio seeks to undo that status.

Windsor rejected the idea that a law that stripped married same-sex couples of their legal status could be justified by a wait-and-see approach. In *Windsor*, the Bipartisan Legal Advisory Group ("BLAG") sought to defend DOMA by pointing to "the need for caution [before] changing such an important institution" as marriage. *See* Brief on the Merits for Respondents BLAG, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 267026, at *10 ("BLAG Brief"). But this Court rejected that argument when it held that no "legitimate purpose" supported DOMA. *Windsor*, 133 S. Ct. at 2696.

Moreover, wait-and-see is precisely the kind of "wholly unsubstantiated" justification this Court has rejected as an irrational basis for classifications discriminating against a minority group. *Moreno*, 413 U.S. at 535-37 (rejecting justifications based on unsupported assumptions about "hippies," and "related" and "unrelated" households); *see also, e.g.*, *Cleburne*, 473 U.S. at 448-49 (rejecting "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable" about those with intellectual disabilities). "The State can plead an interest in proceeding with caution in almost any setting. If the court were to accept the State's argument here, it would turn the rational basis analysis into a toothless and perfunctory review." *Kitchen*, 961 F. Supp. 2d at 1213.

While the State awaits the day when it can rule out "unknowable effects," Petitioners and others like

them urgently await legal protections and relief from the indignities the recognition bans impose. If left to the State's timetable, the "harm and injuries likely would continue for a time measured in years"—if not decades. *Windsor*, 133 S. Ct. at 2688. More children in Ohio will be denied protections for their families, more beloved spouses will die denied the final solace and dignity of recognition of their marriages, and more families will suffer countless daily harms from relegation to a second-tier status. "[T]he urgency of this issue for same-sex couples" cannot be ignored, *id.* at 2689; they should not be required to wait any longer.

3. *"Upholding The Traditional Definition Of Marriage" Rationale*

The Sixth Circuit likewise held that "standing by the traditional definition of marriage" justifies the recognition bans. Pet. App. 40a. But this is a tautology masquerading as a government interest. Promoting a traditional conception of marriage simply for the sake of perpetuating that tradition fails to provide the required "independent" basis for maintaining a discriminatory practice. *Romer*, 517 U.S. at 633. "Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis." *Heller*, 509 U.S. at 326; *see also Williams v. Illinois*, 399 U.S. 235, 239 (1970) ("[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack.").

Given the pedigree the "tradition" rationale shares with past attempts to justify other forms of discrimination, the Court should be particularly

skeptical of its invocation now. *See Plessy v. Ferguson*, 163 U.S. 537, 550-51 (1896) (upholding segregation based on "established usages, customs and traditions of the people"); *Lawrence*, 539 U.S. at 577-78 ("[N]either history nor tradition could save a law prohibiting miscegenation from constitutional attack."). As this Court explained in *Lawrence*, "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Id.* at 579.

B. Preventing "Irresponsible Procreation" Does Not Explain The Recognition Bans

Although not raised by Ohio, the Sixth Circuit relied on a purported "irresponsible procreation" theory to justify the recognition bans. According to the majority below, the bans rationally further the State's interest in channeling the sexual activity of heterosexuals, who run the "risk of unintended offspring," into the state-supported setting of marriage, which offers "an incentive for two people who procreate together to stay together for purposes of rearing offspring." Pet. App. 35a-36a. Under this theory, same-sex couples have no need to marry because their sexual activity does not result in "unintended offspring."

Windsor necessarily rejected this justification, which was advanced by BLAG to justify DOMA. *See* BLAG Brief, 2013 WL 267026, at *43-47. Its irrationality is glaring. Petitioner couples *already* are married and *already* are rearing offspring. Withholding the stability and security that would come from recognition of their marriages does nothing to help the hypothetical children who may have been accidentally conceived by heterosexual

couples, but does inflict grave harms on the actual children being raised by married same-sex couples. This rationale is "so full of holes it cannot be taken seriously." *Baskin*, 766 F.3d at 656.

This conception of marriage as merely a government-run incentive program that channels heterosexuals toward "responsible procreation" is also shockingly out of step with "the popular understanding of the institution" of marriage "as it applies to heterosexual couples." *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting). "[I]t demeans married couples—especially those who are childless—to say that marriage is simply about the capacity to procreate." *Latta*, 771 F.3d at 472 (quoting *Lawrence*, 539 U.S. at 567). "[M]arriage is more than a routine classification for purposes of certain statutory benefits." *Windsor*, 133 S. Ct. at 2692; *see also Griswold*, 381 U.S. at 486. Even when procreation is impossible, the enduring bond and the many other attributes of marriage remain constitutionally protected. *Turner*, 482 U.S. at 95-96. Indeed, a married couple's choice *not* to procreate is itself a fundamental right. *Griswold*, 381 U.S. at 486.

Moreover, the Sixth Circuit's suggestion that only families headed by couples who can accidentally procreate need to "stay together for purposes of rearing offspring," Pet. App. 35a-36a, makes no sense. Because "family is about raising children and not just about producing them," *Baskin*, 766 F.3d at 663, the protections and stability of marriage are important throughout a child's life, not just at the point of conception. "If the fact that a child's parents are married enhances the child's prospects for a

happy and successful life ... this should be true whether the child's parents are natural or adoptive," *ibid.*, and whether the child is conceived through intercourse or with assisted reproduction. The notion that some children should receive fewer legal protections than others based on the circumstances of their conception is not only irrational, it is constitutionally repugnant. *Latta*, 771 F.3d at 472-73; *see also Plyler*, 457 U.S. at 220; *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972).

The irrationality of the "irresponsible procreation" argument is even more profound. Different-sex couples can marry whether they are fertile or infertile, whether they want children or not, and regardless of how the children they raise are brought into the world. The Sixth Circuit's natural procreation requirement is thus imposed only on same-sex couples even though thousands are raising children in the United States—including Petitioner couples—and millions of married different-sex couples are not. [10] The "responsible procreation rationale" is thus "so underinclusive" that it leads to the inescapable conclusion that the disparate treatment "rest[s] on an irrational prejudice." *Bostic*, 760 F.3d at 382 (quoting *Cleburne*, 473 U.S. at 450); *accord Baskin*, 766 F.3d at 656; *see also Eisenstadt*, 405 U.S. at 449 (no rational basis where law was

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[10] *See* Brief of Amicus Curiae Gary J. Gates in Support of Plaintiffs-Appellees and Affirmance, Brenner v. Armstrong, No. 14-14061-AA (11th Cir. Dec. 22, 2014) (according to U.S. Census data, "more than 125,000 same-sex-couple households include nearly 220,000 children under age 18 in their homes"); United States Census, *Fertility of American Women: 2010 – Detailed Tables*, http://www.census.gov/hhes/fertility/data/cps/2010.html (19.4% of women who have been married never had a child).

"riddled with exceptions" for similarly situated groups).

C. Promoting "Optimal Parenting" Cannot Justify The Recognition Bans

Neither the Sixth Circuit nor Ohio has defended the recognition bans based on the notion, espoused by other defenders of recognition restrictions, that they promote an "optimal" childrearing environment of a family headed by a biological mother and father—and with good reason. "[G]ay couples, no less than straight couples, are capable of raising children and providing stable families for them." Pet. App. at 34a. As a logical matter, refusing to recognize the valid marriages of same-sex couples does not rationally further an interest in "optimal" parenting because it does not stop lesbians and gay men from having children; it just harms the children they already have. *Latta*, 771 F.3d at 472-73; *Baskin*, 766 F.3d at 662; *Bostic*, 760 F.3d at 383; *Kitchen*, 755 F.3d at 1226. In addition, the very premise of the "optimal parenting" argument—that restricting recognition of marriage to different-sex couples "safeguard[s] children by preventing same-sex couples from marrying and starting inferior families," *Bostic*, 760 F.3d at 383, is itself an affront to the equal dignity of same-sex couples.[11]

Arguments based on "optimal parenting" also fail as a matter of settled social science. The notion that same-sex couples are less optimal parents than different-sex couples has been rejected by all credible

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[11] Like the "responsible procreation" rationale, the "optimal childrearing" argument was raised—and rejected—as a defense of DOMA in *Windsor*. *See* BLAG Brief, 2013 WL 267026, at *47-49.

scientific research on the issue and by every mainstream child welfare organization. *See Bostic*, 760 F.3d at 383 (summarizing scientific consensus). According to the broad professional consensus, "'there is no scientific evidence that parenting effectiveness is related to parental sexual orientation,' and 'the same factors'—including family stability, economic resources, and the quality of parent-child relationships—'are linked to children's positive development, whether they are raised by heterosexual, lesbian, or gay parents.'" *Ibid.* (quoting amicus brief); *see also* J.A. 228-241.

The inescapable fact is that Ohio's recognition bans do not provide stability or protection to children. Rather, they deny protection to children of married same-sex couples based on the sex and sexual orientation of their parents. As Judge Daughtrey observed in dissent: "[A]lthough my colleagues in the majority pay lip service to marriage as an institution conceived for the purpose of providing a stable family unit 'within which children may flourish,' they ignore the destabilizing effect of its absence in the homes of tens of thousands of same-sex parents throughout the four states of the Sixth Circuit." Pet. App. 72a.

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Though death took the spouses of Petitioners Obergefell and Michener, the State may not take from them the enduring public and private commitments they made through marriage. Likewise, when the State strips the married Petitioner couples raising young families of their marital statuses within Ohio's borders, the State exceeds the bounds of its constitutional authority.

By erasing Petitioners' marriages, the recognition bans deny Petitioners an essential aspect of the liberty and equality guaranteed by the Fourteenth Amendment. *See, e.g., Loving*, 388 U.S. at 12.

CONCLUSION

For the foregoing reasons, the judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

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